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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1094

G. D. SEARLE & CO.,
*Petitioner,*

vs.

MRS. NANCY K. STEELE,
*Respondent.*

## PETITION FOR CERTIORARI

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## PETITION FOR CERTIORARI

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### OPINIONS BELOW

On December 6, 1972, the District Court for the Southern District of Mississippi dismissed the complaint in this case for lack of jurisdiction. The district court's Order and Opinion, which are not officially reported, appear as Appendix A to this Petition.

On August 14, 1973, the United States Court of Appeals for the Fifth Circuit reversed the district court's Order. The Opinion of the court of appeals, which is reported at 483 F.2d 335 (5th Cir. 1973), appears as Appendix B to this Petition.

### JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on

August 14, 1973. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc to the United States Court of Appeals for the Fifth Circuit was denied by order dated October 31, 1973, which appears as Appendix C to this Petition. This Court had jurisdiction to review the judgment in question. 28 U.S.C. §§ 1254, 2101.

## QUESTION PRESENTED FOR REVIEW

The question presented is whether under the due process clause of the Fourteenth Amendment as construed by this Court in *International Shoe* v. *Washington,* 326 U.S. 310 (1945), a Mississippi Court has *quasi in rem* jurisdiction to adjudicate a case in which the State of Mississippi has no interest—where neither Respondent nor Petitioner is a resident of Mississippi, where the alleged injury did not take place in, or have anything to do with, Mississippi, and where the bulk of the attached debts did not arise out of transactions in or involving Mississippi.

## CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> "[N]or shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

## STATEMENT OF THE CASE

This case was initiated by the filing of a complaint on behalf of Respondent in the Chancery Court of Hinds County, Mississippi, seeking to recover damages in the amount of $500,000 allegedly incurred as a result of her consumption of a drug known as "Enovid", manufactured

by Petitioner. The case was removed to the United States District Court for the Southern District of Mississippi.

Neither Petitioner nor Respondent are residents of Mississippi, and Petitioner is not subject to *in personam* jurisdiction in Mississippi. Respondent is and has been, for all times relevant to this lawsuit, a resident of the State of Kansas. She has never been a resident of the State of Mississippi. Petitioner is incorporated in the State of Delaware with its principal place of business in Illinois. Petitioner does not do business, and is not qualified to do business, in the State of Mississippi.

Nor did the alleged cause of action in this case arise in Mississippi. The injury complained of allegedly arose as a result of Respondent's consuming Petitioner's product in Kansas. This product was purchased in Kansas, upon a prescription of a Kansas physician, from a pharmacy located in Kansas. Respondent was given medical treatment in Kansas and received no medical treatment in Mississippi.

This case was brought in Mississippi in order to circumvent the two-year Kansas statute of limitations (KSA 60-513 [1968]). The injury to Respondent allegedly occurred on February 15, 1964. No complaint was filed in Kansas within the statutory period. The applicable statute of limitations in Mississippi is six years (Miss. Code, Chapter 2, §§ 722, 741). Respondent filed her complaint with the Chancery Clerk of the Mississippi state court on January 20, 1970, within one month of the expiration of the six-year period.

The lawsuit in Mississippi was instituted as a *quasi in rem* action by attachment of debts owed by certain drug wholesalers to Petitioner. The attachment defendants were Foremost-McKesson, Inc., Meyer Brothers Drug Company, and Mississippi Drug Company. Foremost-McKesson is a

Maryland corporation, having its principal offices in California; Foremost-McKesson filed an answer to the attachment stating that nationally* it was indebted to Petitioner in the amount of $2,387,870 as of January 31, 1970 (15 days after it had been served with the attachment). Meyer Brothers Drug Company is a Missouri corporation, having its principal offices in Missouri; Meyer Brothers filed an answer stating that it was indebted to Petitioner nationally in the amount of $55,248 as of January 31, 1970. The third attachment defendant, Mississippi Drug Company, is a Mississippi corporation; it filed an answer stating that it was indebted to Petitioner nationally in the amount of $10,578.

In addition to invoking *quasi in rem* jurisdiction, Respondent sought to obtain *in personam* jurisdiction over Petitioner by service of process pursuant to state law.

Petitioner, pursuant to Rule 12 of the Federal Rules of Civil Procedure, filed a Motion to Dismiss the Complaint for lack of jurisdiction. On December 6, 1972, the district court entered its Order granting the Motion.

First, with respect to the asserted *in personam* jurisdiction, the district court concluded, "in the light of 'minimal contacts' and 'traditional notions of fair play and substantial justice'" (Appendix A, p. 6), that Petitioner Searle was not present in Mississippi for jurisdictional purposes (Appendix A, p. 6):

> "[S]earle is not qualified to do business in Mississippi, and has not in law or in fact appointed the Secretary of State of Mississippi or any one else as its agent for

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* This indebtedness of $2,387,870 did not arise out of drug sales by Searle to Foremost-McKesson in Mississippi, but rather arose out of drug sales nationally where the contracts of sale were entered into outside Mississippi, and over 98% of the drugs represented by the attached accounts were delivered to destinations other than Mississippi destinations.

process. It maintains no office or place of business in Mississippi, has not and does not own property in Mississippi, nor has it ever had any place of business, office, warehouse, bank account, business executive, or corporate books or records in Mississippi, nor has it executed any contracts in Mississippi. Searle does have four detail men in the state, but they have no office, merchandise or other property of said corporation in Mississippi; none have authority to accept or approve any orders in the state, and any orders received by them are transmitted to an office outside the state, where the decision is made to accept or reject said orders. On accepted orders, the merchandise is supplied from offices and warehouses outside of the state and are shipped in interstate commerce to customers in Mississippi. Searle maintains no address, post office address or bank account in the state. It makes no collections, nor does it have a collection agency in the state. It has conducted no litigation in the state, nor has it committed any tort in whole or in part against the plaintiff, nor has it made any contract with plaintiff to be performed in whole or in part in Mississippi."

Accordingly, the district court concluded that Petitioner Searle "is not doing business in the State of Mississippi to the degree necessary to give this Court jurisdiction *in personam* under any of the process statutes relied on." In so concluding, the district court expressly relied upon *Nichols* v. *Sterling Drug Co.*, 444 F.2d 745 (4th Cir. 1971) (Appendix A, p. 7) "as having facts similar to this case, in which the Fourth Circuit Court of Appeals, citing *International Shoe* v. *Washington,* 326 U.S. 310, and other authorities said:

> "'If plaintiff's injury does not arise out of something done in the forum state, then other contacts between the corporation and the state must be fairly *extensive* before the burden of defending a suit there may be imposed upon it without offending 'traditional notions of fair play and substantial justice.' Also see *Seymour* v. *Parke, Davis & Co.*, 423 F.2d 584."

This portion of the district court's Order holding that there was no *in personam* jurisdiction because it would "offend traditional notions of fair play and substantial justice" to require Searle to defend this lawsuit in Mississippi was not appealed from, and therefore became final.

Second, with respect to the asserted *quasi in rem* jurisdiction, the district court, relying on this Court's leading decision, *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), ruled that there was no state interest in this case which might justify an exercise of jurisdiction since the protection of a Mississippi citizen was in no way involved (Appendix A, pp. 9-10) (quoting 95 U.S. at 723):

> "So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demands of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. *Every State owes protection to its own citizens;* and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents, to satisfy the claims of its citizens. (Underscoring added)." (Emphasis supplied by the district court.)

Applying the holding of *Pennoyer* v. *Neff*, the district court concluded that (Appendix A, p. 10): "Plaintiff's residence in the state supplies the state's interest. Non-residency does not." The district court also ruled that, apart from the constitutional issues, the Mississippi attachment statute had not been intended to apply in a case in which the State "has no interest whatsoever in the litigation. . . ." (Appendix A, p. 10)

On August 14, 1973, the Court of Appeals for the Fifth Circuit reversed the decision of the district court and held that *quasi in rem* jurisdiction was proper in this case, under both the due process clause of the United States Constitution and Mississippi law.

## REASONS FOR GRANTING THE WRIT

The decision below, if not reviewed and reversed by this Court, would seriously impair the administration of the laws since it permits the use of *quasi in rem* jurisdiction without giving any effect to the requirement of due process, as set forth in *International Shoe Co.* v. *Washington,* 326 U.S. 310, 319 (1945), that jurisdictional doctrines based on territoriality must be subordinated to considerations of reasonableness "in the context of our federal system of government" and of "the fair and orderly administration of the law."

1. The ancient foundation of jurisdiction is territorial power—either over the person of the defendant or over property. The concomittant of state jurisdiction is the state's interest in settling disputes either between parties who are within the state or with respect to property located within the state. In cases where *quasi in rem* jurisdiction is invoked, although the defendant may not be present within the state and the property attached is not itself involved in the substance of the dispute, the state nevertheless may have an interest in exercising jurisdiction. This interest is derived from the obligation of the state to protect its own citizens by affording a forum to plaintiffs who cannot find or obtain service of process on absent or absconding defendants so that the plaintiffs may have an adjudication of their claims to the extent of the value of any property belonging to defendants which is located in the state.

Until recently, territoriality was the sole touchstone of jurisdiction; and, in the case of *quasi in rem* jurisdiction, the presence of property within the state—either a physical *res* or an intangible debt—was regarded as sufficient, by itself, to support jurisdiction.

In such a case, the factor providing the state interest was the obligation of each state to protect those who reside within its own territory: "Every state owes protection to its own citizens. . . ." *Pennoyer* v. *Neff*, 95 U.S. 714, 723 (1878). Unlike the instant case, every case following *Pennoyer* cited by the courts below in which *quasi in rem* jurisdiction was sustained involved a claim made in a particular state by a resident of that state.

The leading decision of this Court on *quasi in rem* jurisdiction based on attachment of a debt is *Harris* v. *Balk*, 198 U.S. 215 (1905). In that case, Epstein, a resident of Maryland, had a claim in the amount of $300 against Balk, a resident of North Carolina. Harris, also a resident of North Carolina, owed Balk $180. Epstein was unable to obtain a personal judgment against Balk because Balk would not come into the State of Maryland. However, when Harris visited Baltimore on a business trip, Epstein caused a writ of attachment to be issued against Balk, attaching the debt due from Harris to Balk. Judgment for $180 was eventually entered in favor of Epstein, and Harris paid the amount of the judgment. Subsequently, in North Carolina, Balk commenced an action against Harris to recover the full amount of Harris' debt to Balk, without regard to Harris' prior payment to Balk's creditor. Harris pleaded in bar the Maryland judgment and payment thereof. The trial court entered judgment for Balk, holding that the Maryland court had no jurisdiction to attach the debt due from Harris to Balk because the situs of the debt was in North Carolina. Following an affirmance by the highest court in North Carolina, this Court reversed, holding that the judgment on behalf of Epstein attaching the debt due from Harris to Balk was within the jurisdiction of the Maryland Court. Unlike the instant case, this Court's decision in *Harris* v. *Balk* was fully consistent with *Pennoyer*

since the plaintiff, Epstein, who invoked the Maryland attachment process was a citizen of the forum state of Maryland.*

No case, to our knowledge, has ever before held that the courts of a state might exercise *quasi in rem* jurisdiction where there is *no* state interest such as that found in *Pennoyer* v. *Neff* and *Harris* v. *Balk*.

2. In any event, whether or not *quasi in rem* jurisdiction as traditionally justified by pre-1945 notions of territoriality might have sufficed in this case even though no state interest was present, this Court ruled in 1945 that in determining the constitutional limits of jurisdiction, the old notions of territoriality must be subordinated to considerations of reasonableness "in the context of our federal system of government" and of "the fair and orderly administration of the laws". *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). This Court ruled that the issue in *International Shoe* was not merely whether the defendant was physically within the territory of the forum State of Washington, but rather whether the defendant's contacts with the forum state was sufficient "to make it reasonable" to require the defendant to defend the suit in that state, taking account of the "inconveniences" to the defendant in conducting the defense (*id.*, at 317):

> "[The] demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An

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* See also *Ownbey* v. *Morgan*, 256 U.S. 94 (1921), in which Morgan, whose executors brought an action by attachment in Delaware, had been a resident of Delaware, the forum state; and the cause of action against Ownbey had arisen in the forum state.

> 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."

Whether defendant's contacts with the forum state were sufficient to give rise to jurisdiction could be determined only "in relation to the fair and orderly administration of the laws" (326 U.S. at 319):

> "The test is not merely . . . whether the activity, which the corporation has seen fit to procure through its agents . . . is a little more or a little less. *Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.*" (Emphasis supplied.)

In the instant case, the central issue is whether these constitutional due process principles, as set forth in *International Shoe,* are to be applied only with respect to that branch of jurisdiction which depends on jurisdiction over persons, or whether they also apply to jurisdiction asserted by virtue of power over intangible things.

The court below recognized that *International Shoe* had "transformed the jurisdictional landscape" (Appendix B, pp. 14, 15):

> "Over the last thirty years . . . a veritable army of courts and commentators have besieged the citadel of territorial jurisdiction. The old territorial standards have been castigated as at once too restrictive and too permissive. . . . In its historic opinion in *International Shoe* . . . , the Supreme Court rejected decades of precedent basing *in personam* jurisdiction over corporations on the fiction of corporate 'presence,' and called for a standard that looks less toward territorial power and more toward the convenience of the parties."

However, the court below confined the holding of *International Shoe* to *in personam* jurisdiction, pointing out that "the Supreme Court has not had occasion since *Harris* [*Harris* v. *Balk*, 198 U.S. 215 (1905)] to reconsider the specific question of *quasi in rem* jurisdiction based on the attachment of a debt. . . ." (Appendix B, pp. 13-14)

As this court of appeals analyzed it, resolution of the issue in the instant case was simply a matter of applying the principles of *Harris* v. *Balk*. In *Harris* v. *Balk*, this Court had ruled that a debt was located "with the debtor for purposes of asserting territorial authority. . . ." (Appendix B, p. 11). Thus, in the instant case, the only question to be answered was whether Mississippi had territorial authority over the attachment defendants, the wholesale drug companies which had purchased drugs from Petitioner Searle. The court of appeals concluded that it could not "say that the presence of a potential defendant's debtor [the wholesale drug companies] within a state is either irrelevant or insignificant in determining the fairness of subjecting the defendant to the process and tribunals of that state." (Appendix B, p. 18). Thus, the presence of the attachment debtor in the state was held, by itself, to be sufficient contact to justify jurisdiction: "Indeed, the presence of a *res* tangible or otherwise, within the jurisdiction represents a crucial point of contact. It goes far toward providing the essential 'minimum' necessary for the constitutional assumption of jurisdiction." (Appendix B, p. 18). No consideration of factors other than physical presence of the attachment debtors—such as "the context of our federal system", or "the fair and orderly administration of the laws"—was deemed to be constitutionally required.

Petitioner respectfully suggests that the court below erred, but, more important for present purposes, it urges that this Court should decide whether the basic principles of constitutional due process set forth in this Court's decision in *International Shoe* apply to *quasi in rem* as well as *in personam* jurisdiction. The court below declined to consider whether an exercise of jurisdiction in the instant case is reasonable "in the context of our federal system of government" or whether it would be conducive to "the fair and orderly administration of the laws." Instead, the court below regarded these as "technicalities [which] have no bearing on the underlying constitutional issue." (Appendix B, p. 15) However, such considerations are far from "technicalities"; instead, they lie at the very heart of due process of law. Accordingly, Petitioner believes that this Court would conclude that an exercise of jurisdiction in this case is inconsistent with due process of law since it would result in the trial of this case in a forum which has no relationship to either the parties or the substance of the lawsuit.

It is particularly appropriate that this Court consider the jurisdictional issue in the instant case since it is undisputed that the contacts of this Petitioner with the forum state of Mississippi are not sufficient to impose on it the burden of defending *in personam* in Mississippi. This was the square holding of the district court (Appendix A, p. 7); and this holding was not appealed from, and accordingly became final. The court of appeals below, in reversing the district court, did not disagree with this holding; instead it simply gave no consideration to what this Court in *International Shoe* described as "the inconvenience which would result to the corporation from a trial away from its 'home' or principal place of business" (326 U.S. at 317), but simply

dismissed such considerations on the theory that distance is no longer "a meaningful menace" in a "mobile society" which approaches "the speed of light". (Appendix B, p. 19) This treatment, or rather non-treatment, of the problems of having to defend a lawsuit in a distant foreign jurisdiction squarely violates this Court's holding that to compel a defendant "to defend the suit away from its home or other jurisdiction where it carries on more substantial activities" in the absence of any state interest would "lay too great and unreasonable a burden on the corporation to comport with due process" (326 U.S. at 317).

Moreover, the judgment below encourages resort to *quasi in rem* jurisdiction with the attendant inconveniences imposed on non-resident defendants at a time when any need for such jurisdiction has substantially diminished. The decision in *International Shoe* and the enactment in most states of "long arm" statutes permitting extended personal service have virtually eliminated any public interest in extended *quasi in rem* jurisdiction, since these developments enable plaintiffs to sue non-resident defendants by invoking *in personam* jurisdiction in the state of plaintiff's residence. See Carrington, "The Modern Utility of Quasi In Rem Jurisdiction", 76 *Harvard Law Review*, 303, 305-306, cited by the district court in its decision below (Appendix A, p. 10); and "Garnishment of Intangibles: Contingent Obligations and the Inter-State Corporation", 67 Colum. L. Rev. 550 (1967). Under these circumstances, this Court should review and reverse a decision which would permit plaintiffs to invoke an antiquated and hitherto limited *quasi in rem* jurisdiction, thereby burdening the courts of states having no interest in the litigation and imposing the burden of litigating in a foreign and often distant forum upon corporate defendants such as Petitioner.

3. The court of appeals below observed (Appendix B, p. 19, fn. 26), that Petitioner's real concern was not with defending this lawsuit in a foreign forum but with application of the statute of limitations of that forum state. The Mississippi statute of limitations period applicable to this lawsuit is six years; whereas the Kansas statute provides for a two year period.* The district court did not rule on the question of which statute of limitations period would apply since it ruled that it did not have jurisdiction (Appendix A, p. 9): "In this connection, there is considerable doubt whether plaintiff may be entitled to use the longer period in view of the rationale of *Ramsay* v. *Boeing Company,* 432 F.2d 592, although this issue is not yet before the Court nor decided herein." Likewise, the court of appeals pointed out that the issue of which statute of limitations would apply was not presented (Appendix B, p. 19, fn. 26):

> "Since the question of the application of the Mississippi statute of limitations was reserved in the court below and has not been briefed on appeal, we express no opinion on either the appropriate limitations period under Mississippi choice of law rules, see Klaxon Co. v. Stentor Manufacturing Co., 1941, 313 U.S. 487, or the constitutionality of the application of Mississippi law to the facts of this case. See Home Ins. Co. v. Dick, 1930, 281 U.S. 397."

Thus, the issue of which statute of limitations would apply is not an issue which is before this Court.

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* Of the 50 states, 40 have personal injury statutes of limitations providing for a period of limitations of three years or less. The longest limitations period is six years, which is provided in only seven states, including Mississippi: Colorado (Col. R.S. 1963, § 87-1-11), Maine (M.R.S.A. 1964 Tit. 14, § 752), Minnesota (Minn. Stats. 1967, § 541.05), Mississippi (Miss. Code 1942, § 722), New Hampshire (N.H.R.S.A. § 508.4), North Dakota (N.D. Cent. Code, 28-01-16), South Carolina (S.C. Code 1962, § 10-143).

However, it is important to note that the only reason *quasi in rem* jurisdiction has been invoked in Mississippi in this case, rather than bringing the lawsuit in a state such as Kansas which has a legitimate interest in resolving the dispute, is that Respondent seeks to invoke the longer statute of limitations of Mississippi.* The inevitable result of the decision of the court of appeals below would thus be to encourage forum shopping and to compel the courts to deal with a variety of choice-of-law problems, such as (but not limited to) the statute of limitations issue, which otherwise would never be presented.

Such a result would be inherent if the exercise of *quasi in rem* jurisdiction is sustained in this case, since many corporations are in the same position as Petitioner. The great bulk (over 98%) of the debts which were attached were created by transactions not involving Mississippi; that is, they did not arise out of shipments by Petitioner of its products to Mississippi, or contracts made by Petitioner with Mississippi companies. Instead, these debts arose out

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* Respondent, by bringing this lawsuit in Mississippi, is seeking to persuade the trial court to create, in effect, a single national statute of limitations. Under Respondent's theory, any plaintiff wishing to bring a lawsuit against such a corporate defendant would be permitted to nullify the effect of the statute of limitations of his own state or any other state where personal service might be made on the defendant by simply filing suit in the state whose statute of limitations provides for the longest period and by invoking the *quasi in rem* jurisdiction of that state's courts. Claims long since considered foreclosed under the laws of states having legitimate interests in protecting the rights of the parties could be raised in Mississippi, with resulting frustration of the laws, policies, and interests of the other states. Such results would unduly and unfairly increase the burdens on the federal courts and clearly would not promote the "fair and orderly administration of the laws" in "the context of our federal system of government".

of shipments by Petitioner, a corporation having its principal place of business in Illinois, to distributors in New York, California, and other states. The products shipped were then sold in those states. The attachment of over $2 million in debts owed to Petitioner in Mississippi was accomplished only because Petitioner's customer-debtors were national companies which were subject to personal service in Mississippi. By the same token, virtually every major corporation has at least some customers or other debtors which would be subject to personal service in Mississippi (or one of the other handful of states having the longest applicable statute of limitations periods). Thus, such corporate defendants would be subject to suit by means of *quasi in rem* jurisdiction in Mississippi to the same extent as Petitioner.

Accordingly, we urge this Court to grant certiorari and review a decision below which will, if not reversed, unnecessarily confront the district court below on remand, and ultimately other district courts throughout the country, with this choice of law issue and others and thereby unnecessarily frustrate "the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *International Shoe,* 326 U.S. at 319.

## CONCLUSION

For the reasons stated herein, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Date: January, 1974

# APPENDICES

## APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MRS. NANCY K. STEELE
*Complainant*

*vs.*

G. D. SEARLE & COMPANY
*Defendant*

AND

MISSISSIPPI DRUG CO., INC., ET AL
*Attachment Defendants*

CIVIL ACTION NO. 4614

### ORDER

This cause coming on to be heard on defendant, G. D. Searle & Company's, motion to dismiss the complaint filed herein because of lack of jurisdiction, pursuant to Rule 12 of the Federal Rules of Civil Procedure, and it appearing that all parties entitled thereto have received due notice and that the motion has been fully briefed and argued, and this Court being fully informed in the premises; and this Court having rendered its opinion, dated December 6, 1972, herein, in which this Court finds that the case should be dismissed for lack of jurisdiction:

It is, therefore, ordered and adjudged that the defendant's motion to dismiss be, and the same is hereby, sustained and that the complaint be, and the same is hereby, dismissed for lack of jurisdiction; and

It is further ordered and adjudged that the attachments filed hereby by the complainant against the attachment defendants in this cause be and the same are hereby quashed, vacated and dismissed and said attachment defendants be, and they are hereby, dismissed and discharged; and

It is further ordered and adjudged that the cause sought to be maintained in this suit be, and is hereby, dismissed, and that the complainant, Mrs. Nancy K. Steele be, and she is hereby assessed with all costs of this suit, to be taxed by the Clerk of this Court and for which proper process may issue.

ORDERED AND ADJUDGED this 22nd day of December, 1972.

/s/ Dan M. Russell, Jr.
*United States District Judge*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MRS. NANCY K. STEELE

*Plaintiff*

*vs.*

G. D. SEARLE & COMPANY,

*Defendant*

AND

MISSISSIPPI DRUG CO., INC., ET AL

*Attachment Defendants*

CIVIL ACTION NO. 4614

## OPINION OF THE COURT

Mrs. Nancy K. Steele, a resident of Kansas, filed a bill of complaint in the Chancery Court of the First Judicial District, Jackson, Mississippi, against G. D. Searle & Company, a Delaware corporation with its principal place of business at Skokie, Illinois, and against three attachment defendants, Mississippi Drug Company, Inc., Fore-Most McKesson, Inc., and Meyer Brothers Drug Company, debtors of the principal defendant holding assets subject to attachment by virtue of Section 2729, Mississippi Code of 1942.

Plaintiff, while residing in Kansas claims that, as a result of taking the drug "Enovid", manufactured and distributed by the principal defendant, Searle, she suffered a stroke on or about February 15, 1964, leaving her permanently injured.

Searle removed the case to this Court as a diversity case subject to removal pursuant to Section 1441, 28 U.S.C.A., reserving, however, its right to object to the jurisdiction of the Court, denying that it has been served with valid process and refusing to waive service of process.

Subsequently, defendant filed its answer, including affirmative defenses, and moved the Court, under Rule 12, FRCP, to (1) quash the service of process and dismiss the suit on the grounds that defendant is not qualified to do business in Mississippi, has no resident agent for process, and conducts no business in Mississippi such as to make it amenable to process, (2) dismiss the complaint for lack of venue jurisdiction, or, alternatively, to transfer the case, on the grounds that this Court has no jurisdiction under 28 U.S.C.A., 1404, or 1406 or any other statute or rule of law. The Court finds that defendant has not waived its right to raise these issues. *Neifeld* v. *Steinberg,* 438 F. 2d 423. Other motions were consolidated with the above.

The Judge, then presiding, overruled all motions, and found by order dated June 1, 1971 that this Court, upon the removal of the cause, became vested with the attachment jurisdiction that was vested in the state court, refusing however, at that time to pass upon the question of whether or not the Court had acquired in personam jurisdiction over the defendant.

The defendant has renewed its motion to dismiss for lack of jurisdiction, denying that this Court has acquired in personam jurisdiction over the defendant, and contending that the action, being quasi in rem, may not be maintained by a non-resident plaintiff against a non-resident defendant under either the due process or commerce clause of the U. S. Constitution.

Plaintiff not only claims that Mississippi statutes permitting the attachment of a non-resident's property within the state are constitutionally valid, but also claims that jurisdiction has been acquired over the defendant in personam by reason of the service of process acquired herein.

The issues have been argued to the Court and briefs have been submitted.

Prior to the removal of this case, the record reflects that process was served on the three attachment debtors by personal summons served by the Sheriff of Hinds County, and all three have filed answers herein. Process on defendant Searle was attempted to be served by said sheriff on one William M. Carpenter, as defendant's agent, apparently by virtue of Sections 5345 and 5346, Mississippi Code of 1942. The sheriff's original return shows that Carpenter was not found. An alias summons was served on Carpenter. Plaintiff also undertook to serve process by process on the Secretary of State under Mississippi's "long arm" statutes, Section 1437 and Section 5309-230. All of these statutes provide that service of process in either manner is dependent on a finding that defendant is "doing business" in the state. Although defendant has not contested the capacity of Carptener to accept process as its agent, defendant strenuously denies that it is doing business in Mississippi as to subject it to either mode of process. At the outset, under *Erie* v. *Tompkins,* 304 U.S. 44, the Court, following Mississippi law, finds that the attempted service by means of Section 1437 was not valid. This statute, by its terms, is intended for the benefit of residents of Mississippi. In the case sub judice, the plaintiff is not a resident of Mississippi, and no part of her cause of action accrued in this state or grew out of any act, contract, or tort, in whole or in part, committed by defendant in this state. Mississippi has broadly interpreted this statute, see *Smith* v. *Temko,*

252 So. 2d 212, but, in the absence of a contract or tort committed in whole or in part in this state, this statute is not available to plaintiff. As to whether process has been obtained on defendant under Sections 5346 and 5309-230, the language of these sections control. Even these must be read in the light of "minimal contacts" and "traditional notions of fair play and substantial justice."

Searle, by the affidavit of its secretary, Paul Higdon, shows that Searle was incorporated in Delaware with its principal place of business at Skokie, Illinois. He stated that Searle is not qualified to do business in Mississippi, and has not in law or in fact appointed the Secretary of State of Mississippi or any one else as its agent for process. It maintains no office or place of business in Mississippi, has not and does not own property in Mississippi, nor has it ever had any place of business, office, warehouse, bank account, business executive, or corporate books or records in Mississippi, nor has it executed any contracts in Mississippi. Searle does have four detail men in the state, but they have no office, merchandise or other property of said corporation in Mississippi; none have authority to accept or approve any orders in the state, and any orders received by them are transmitted to an office outside the state, where the decision is made to accept or reject said orders. On accepted orders, the merchandise is supplied from offices and warehouses outside of the state and are shipped in interstate commerce to customers in Mississippi. Searle maintains no address, post office address or bank account in the state. It makes no collections, nor does it have a collection agency in the state. It has conducted no litigation in the state, nor has it committed any tort in whole or in part against the plaintiff, nor has it made any contract with plaintiff to be performed in whole or in part in Mississippi.

Plaintiff contends that from defendant's answers to interrogatories it is apparent that defendant sells a substan-

tial volume of drugs to hospitals, drug companies and wholesalers in Mississippi, and that its full time detail men, who reside in the state and who use leased automobiles paid for by Searle, are engaged in calling on physicians and pharmacists and assisting them with their orders. Despite these contentions, the Court is convinced that defendant is not doing business in the State of Mississippi to the degree necessary to give this Court jurisdiction in personam under any of the process statutes relied on. *Ross Construction Co.* v. *U. M. & M. Credit Corp.*, 214 So. 2d 822.

See *Nichols* v. *Sterling Drug Co.*, 444 F.2d 745, cited by defendant, having facts similar to this case, in which the Fourth Circuit Court of Appeals, citing *International Shoe* v. *Washington*, 326 U. S. 310, and other authorities said: "If plaintiff's injury does not arise out of something done in the forum state, then other contacts between the corporation and the state must be fairly *extensive* before the burden of defending a suit there may be imposed upon it without offending 'traditional notions of fair play and substantial justice.'" Also see *Seymour* v. *Parke, Davis & Co.*, 423 F.2d 584.

As to jurisdiction acquired over the rem, this Court finds that the process required under the Mississippi chancery attachment statutes was technically complied with, as found by the presiding Judge in his order of June 1, 1971. In the absence of jurisdiction in personam, the jurisdiction is solely over the rem, and no judgment may be satisfied unless the plaintiff gives security therefore before the expiration of two years, during which time the defendant may appear and answer.

In referring to Mississippi chancery attachment statutes, Griffith's Mississippi Chancery Practice, 2nd Edition, at Section 484 has this to say: "The proceeding is one primarily in rem, and in order to give jurisdiction in chancery

by attachment against a non-resident there must exist the following factors: (1) The non-residence of the debtor; and (2) either (a) that he owns lands in the state, or (b) that there are effects belonging to him in the hands of a person in this state, or (c) that there is some person in this state indebted to the said non-resident debtor, and (3) the issuance of the proper process against the land, or effects or debt, as provided by statute, so as to bring the res under control of the court; and it is well settled that when the jurisdictional facts do not exist the proceedings must be dismissed, even though the non-resident defendant has appeared, provided that in his appearance he raise at the outset the defect as to jurisdiction and thus does not waive it."

Section 485, Ibid, says: "Non-residents may attach non-residents, . . . . A non-resident within the meaning of the attachment law is one who is out of the state intending to remain out for an indefinite period, although he occasionally makes short and uncertain visits . . . . The test is: In order that a person shall be a non-resident under the statute his non-residence must be such that the ordinary processes of the law cannot be executed upon him in any of the modes recognized by our statutes for the serving of process upon residents of the state."

Although Griffith is a commanding authority on Mississippi chancery practice, and, although Mississippi as late as 1962[1] recognized the right of a non-resident to attach property of a non-resident in the hands of a resident debtor, the obvious intention of the statutes is to afford security to a claimant against an absent or absconding debtor, a status which would presuppose that the resident was a former resident of the state who had removed him-

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[1] *Alabama, Tennessee & Northern R.R. Co.* v. *Howell,* 141 So. 2d 242.

self from the process of the state courts. That is not the case here where defendant has never been a resident of the state. Too, with the advent of long arm statutes, and the fact that non-resident corporations found doing business in Mississippi are solvent more often than not, the chancery attachment process has become unique. Here it is being used solely as an aid to jurisdiction, a weapon to compel a solvent non-resident corporation, which has never resided in the state, and which is not an absconding debtor or one which has absented itself from the state to avoid creditors or claimants, to submit itself to the jurisdiction of a Mississippi court, and in the process have its funds attached, in this case, funds slightly less than $2,500,000.00, but far more than plaintiff seeks in her unliquidated claim. It does not seem just or right where plaintiff has apparently allowed her claim to expire in the state of her residence and where the action accrued, to permit her to intrude into the courts of this state, which has no interest whatsoever in the litigation, and by an attachment process acquire quasi jurisdiction over a defendant otherwise not amenable to personal or constructive process, purely for the purpose of availing herself of this state's longer statutory period of limitations for her tort claim. In this connection, there is considerable doubt whether plaintiff may be entitled to use the longer period in view of the rationale of *Ramsay* v. *Boeing Company,* 432 Fd. 2d 592, although this issue is not yet before the Court nor decided herein.

Defendant contends that a substantial state interest is essential to sustain quasi in rem jurisdiction because of the heavy burden such jurisdiction imposes on non-resident defendants, citing from *Pennoyer* v. *Neff,* 95 U. S. 714:

"So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them;

and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its own citizens. (Underscoring added).

Plaintiff's residence in the state supplies the state's interest. Non-residency does not. Defendant further quotes from "The Modern Utility of Quasi in Rem Jurisdiction", 76 *Harvard Law Review,* 303, 305-306: "In the light of the emerging concept of personal jurisdiction, the quasi in rem procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by plaintiff." (Underscoring added).

Finally, defendant claims that for this Court to retain jurisdiction on any process which permits the seizure or attachment of a defendant's property without prior notice and a hearing would be in the face of the concepts of *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, and *Fuentes* v. *Shevin,* 40 LW 4692 (1972). In these cases the U. S. Supreme Court, as to garnishment in one, and replevin in the other, found unconstitutional state statutes which permitted pre-judgment seizures without prior notice and hearing. This Court not only has no authority to declare Mississippi's chancery attachment statutes unconstitutional, but will not attempt to forecast what the Supreme Court's attitude will be. It is sufficient to say that this Court does find that it should not retain jurisdiction on the basis of the facts in this case.

Accordingly, the Court finds that this case should be dismissed. An appropriate order may be submitted.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

DATED: Dec. 6, 1972

## APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 73-1308
Summary Calendar*

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Mrs. Nancy K. Steele,
Plaintiff-Appellant,

versus

G. D. Searle & Co., et al.,
Defendants-Appellees.

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*Appeal from the United States District Court for the Southern District of Mississippi*

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(August 14, 1973)

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Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

GOLDBERG, Circuit Judge: The debate over the wisdom of the constitutional grant of diversity jurisdiction has much currency, as well as many argumentative antecedents. The reaches and restrictions of the grant are and have been constantly before committees, commissions, and the Congress. While reports, debates, and perhaps legis-

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* Rule 18, 5 Cir., *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

lation gestate, we are forced to decide today a diversity case with many state and federal implications. We cannot wait for tomorrow's panacea; we cannot delay our decision. This action was originally filed in 1970 in the Chancery Court of the First Judicial District of Hinds County, Mississippi and removed, under the provisions of 28 U.S.C. § 1441,[1] to the United States District Court for the Southern District of Mississippi. Plaintiff-appellant, Mrs. Nancy K. Steele, sought to obtain jurisdiction over defendant-appellee, G. D. Searle & Co., both by personal service on an employee of appellee resident in Mississippi[2] and by the attachment of debts owed appellee by companies doing business in Mississippi[3]. The district court dismissed the

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[1] Section 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

[2] Personal jurisdiction was sought on the assumption that defendant was "doing business" in Mississippi within the meaning of Miss. Code §§ 1437, 5309-230 and 5346 (1942).

[3] Jurisdiction through attachment was founded on the provisions of Miss. Code § 2729 (1942):

> The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an apearance.

complaint holding that the state laws did not permit the assertion of jurisdiction over appellee on either basis, and that Mississippi *could* not, consistent with the Due Process Clause, exercise jurisdiction over appellee on the facts of this case. Plaintiff appeals only from the holding that valid jurisdiction was not obtained under the Mississippi attachment statutes, Miss. Code §§ 2729, 2733 (1942).[4] Finding that the law of Mississippi authorizes and the Constitution of the United States permits application of the jurisdictional device of attachment on the facts of this case, we reverse.

## I. THE RECORD AND HOLDING IN THE DISTRICT COURT

Appellant, a resident of Kansas, alleges in her complaint that she purchased in her home state certain birth control pills manufactured by appellee and that, as a result of her use of appellee's inadequately tested product, she suffered a serious and debilitating stroke on February 15, 1964, for which she seeks $500,000 in damages. Appellee, a drug company with an extensive distribution network, is incorporated in Delaware and has its principle place of business in Illinois. Although appellee owns no property in Mississippi, it does maintain three full time employees in that state for the purpose of soliciting orders. In answer to interrogatories submitted by appellant, appellee stated that, although it is not licensed to do business in Mississippi, its sales in that state over the three year period prior

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(The attachment statute will be cited to the Mississippi Code of 1942. The Mississippi Code 1972 becomes effective November 1, 1973. Under the new codification the language of the statute will remain the same. See Miss. Code § 11-31-1 (1972).

[4] Section 2733 (Miss. Code § 11-31-9 (1972)) provides for notice and the opportunity for the defendant to appear and be heard.

to the filing of this action amounted to more than $800,000. At the time of the filing of the complaint in state court, however, three drug wholesale firms indebted to appellee were present and doing business in Mississippi, one having been incorporated there. Purporting to act on the basis of Miss. Code § 2729 (1942), appellant served the wholesalers with writs of attachment, the *res* or subject of the attachment being all monies owed to appellee by the attachment defendants, some $2,458,996.17.[5] Personal service was also made on one of the soliciting agents employed by appellee in Mississippi.

After the removal of this action appellee filed consolidated motions for relief under Rule 12, Federal Rules of Civil Procedure, alleging, *inter alia,* that the court lacked jurisdiction of the person. This motion was originally denied. However, following a realignment of the district court docket and the assignment of this case to another judge, appellee renewed its motions to dismiss and met with more favorable results. The district court granted the motion, finding that (1) there was no jurisdiction under the Mississippi attachment statute and (2) the Due Process Clause would bar any attempt by Mississippi to exercise such jurisdiction. Specifically, the district court found that although the Mississippi attachment statute did permit the assertion of jurisdiction through attachment of a debt and appellant had complied with all of the technical requirements of state law, the court lacked jurisdiction because:

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[5] This was the amount of indebtedness admitted by the attachment defendants in their answer to writs of attachment.

Appellee offered the following breakdown of the indebtedness as of January 31, 1970: (a) Foremost-McKesson, Inc., a Maryland corporation, owed Searle $2,387,870; (b) Meyer Brothers Drug Company, a Missouri corporation, owed $55,248; and (c) the Mississippi Drug Company, a Mississippi corporation, owed $10,578.

> "The obvious intention of the statutes is to afford security to a claimant against an absent or absconding debtor, a status which would presuppose that the resident was a former resident of the state who had removed himself from the process of the state courts. That is not the case here where defendant has never been a resident of the state."

The court below also found that the Mississippi law permitting attachment for jurisdiction purposes was not meant to apply to a case such as this, in which the state's only "interest" in the litigation would be jurisdictional, since appellant resorted to the Mississippi procedures "purely for the purpose of availing herself of this state's longer statutory period of limitations for her tort claim."[6] The court further held that the heavy burden of defending an action on the basis of an out of state attachment could not be imposed, consistent with fair and just procedures and the applicable decisions of the United States Supreme Court, without a "substantial state interest" in the outcome of the controversy. The district court found an insufficient interest in this case, which involves a suit between a non-resident plaintiff and a non-resident defendant on a cause of action arising out of state, and therefore dismissed appellant's complaint.[7]

The jurisdiction of a federal district court in a case

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[6] The applicable Kansas statute of limitations for such claims provides a two year period in which to bring suit. Mississippi allows six years in personal injury cases.

[7] Appellee also argued below that the entire process of prejudgment attachment without prior notice and opportunity to be heard would be violative of the precepts of due process elaborated in Fuentes v. Shevin, 1972, 407 U.S. 67 and Sniadach v. Family Finance Corp., 1969, 395 U.S. 337. The district court found it unnecessary to reach that question and it has not been raised on appeal. It is, of course, always open to appellee to raise the matter on remand.

removed from the state courts is derivative. It depends largely for its validity on whether the state court had jurisdiction, both as a matter of state and federal law. This rule is applicable even though as an original matter, the suit could have been brought in federal court without impediment. *Lambert Run Coal Co.* v. *Baltimore and Ohio R. Co.*, 1922, 258 U.S. 377, 382. The district court in this case had only that jurisdiction conferred by the laws of Mississippi on the Chancery Court of Hinds County, no more and no less[8]. By the same token, if the Due Process Clause of the Fourteenth Amendment prevents Mississippi from obtaining jurisdiction, a federal court is likewise without power to proceed on removal.

## II. THE MISSISSIPPI LAW

At first blush the holding of the court below in interpreting the Mississippi chancery statute would appear to be at odds with the plain meaning of the words. Section 2729 is set out in its entirety in Footnote 3, supra, but a few of its aspects merit special consideration. The district court stated that the clear purpose of the statute is to deal with potential defendants who have at one time resided in Mississippi but are "absent or absconding" at the time of attachment, and that the provision was not intended to reach individuals or businesses that had never "resided" in the state. The statute, however, specifically includes

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[8] *Lambert Run* provides that the federal jurisdiction cannot obtain in the absence of valid prior state jurisdiction, but it is Rule 64 of the Federal Rules of Civil Procedure that has long permitted federal district courts to hear such cases at all, by authorizing the federal courts to hear removed cases founded on attachment. It was only in 1963 that the Rules were amended to permit original federal jurisdiction on the basis of attachment, the so called *in rem* and *quasi in rem* jurisdiction of the federal courts. *See* F.R.C.P. 4(e)(2).

*non-residents* in the class subject to jurisdiction on the basis of attachment; and it appears to view them as a group distinct from once and future residents.

> "The chancery court shall have jurisdiction of attachment suits . . . against any non-resident, absent or absconding debtor,[9] who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor."

Although it would be difficult to imagine statutory language more closely embracing the case at bar, faced only with the Mississippi Code and the facts of this case, we would hesitate to reverse the interpretation offered by the district judge, lawyer of extensive practice in the State of Mississippi. However, not even our justified deference to the conclusions of the district court can be permitted to obscure the explicit command of *Erie R.R. v. Tompkins*, 1938, 304 U.S. 64, that the authoritative legislative and judicial tribunals of the states are the ultimate instructors of the federal courts on matters of state law.[10]

We must be guided by the decision of the Mississippi Supreme Court in *Alabama, Tennessee & Northern R. Co. v. Howell*, 1962, 141 So.2d 242, which held that jurisdiction could be obtained through attachment on the basis of facts nearly identical to those presented by this appeal. In *Howell*, the plaintiff, a resident of Alabama, brought suit in Mississippi against the defendant railroad, incorporated

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[9] The statute provides that the defendant's debtor status may, as is alleged here, arise equitably from the commission of a wrong causing plaintiff injury (ex delicto).

[10] Indeed the notion that state court decisions interpreting state statutes are binding on federal courts in diversity decisions was accepted long before *Erie*. *See* Green v. Neal's Lessee, 1832, 6 Pet. 291.

and doing business only in Alabama, to recover for injuries suffered in a railroad crossing accident in Alabama. Howell attempted to obtain jurisdiction by means of personal service on an employee of the defendant, resident in Mississippi, and through the attachment of debts owed the defendant by another railroad doing business in Mississippi. As in this case, the litigation involved an individual, non-resident plaintiff seeking recovery in tort against a corporate non-resident defendant, owning no property and found not to be doing business in Mississippi. Like the case before us, *Howell* involved allegedly tortious conduct that did not take place in Mississippi and apparently had no connection with it. The Mississippi Supreme Court held,

> "In the case at bar, we hold that an action *in rem* is maintainable against the appellant A.T. & N.R.R. Company, if process is completed by publication, but that since appellant is not doing business in this State, no personal judgment can be rendered against it in this suit unless it enters its appearance." 141 So.2d at 246.

Since the district court has found and appellee admits that the technical requirements of notice have been complied with, *Howell* would appear to be controlling on the question of state law.

The opinion of the district court suggests one possible basis on which to distinguish *Howell*—the appellant's reason for choosing Mississippi as a forum.[11] But at no point in *Howell* does the state supreme court allude to the plaintiff's motive in coming to Mississippi to initiate his action. This is true in spite of the fact that the rather extraordinary situation in that case[12] would have made it the natural

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[11] In this case, the reason is clearly Mississippi's six year statute of limitations.

[12] As far as appears from the *Howell* opinion, every conceivable aspect of the case was related only to one state, Alabama. Yet the plaintiff sought recovery across the border in Mississippi.

vehicle for an examination of whether the plaintiff was engaging in prohibited forum shopping. This court cannot, consistent with *Erie*, add an interpretive gloss to the Mississippi chancery statute when that state's highest court has so recently declined to do so.

On occasion federal courts might justifiably have complained that the combination of *Erie* and the paucity of relevant state precedents has turned the disposition of diversity cases into a kind of judicial mind reading exercise.[13] That is not true here. Our *Erie* guess is truly an educated one. We are not in the quandry of the philosopher who defined his task as searching in vain for a black cat in a dark room. This court has no right to expect any more explicit direction from the State of Mississippi in deciding this case than that offered by the opinion in *Howell*. We must conclude that, faced with the facts of the case at bar, the Mississippi Supreme Court would find the provisions of the attachment statute applicable.

## III. THE DUE PROCESS CLAUSE

Unfortunately the relatively recent and clear authority of the Mississippi Supreme Court on the issues of state law is not matched by equal federal precision on the constitutional question involved here. The path of United States Supreme Court decisions on the limits of state court jurisdiction has been neither straight nor narrow, and it will be necessary for us to travel this winding road with great care.

The substance and tone of federal decisions on state court jurisdiction through most of this century were set by the decision of the Supreme Court in *Pennoyer v. Neff*, 1878,

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[13] *See, e.g.*, Fidelity Union Trust Co. v. Field, 1940, 311 U.S. 169; King v. Order of United Commercial Travellers, 1948, 333 U.S. 153.

95 U.S. 714, a case involving a dispute over title to land in Oregon. Neff claimed the tract under a patent of the United States. Pennoyer had purchased the property at a sheriff's sale, conducted pursuant to the execution of a state court judgment obtained against Neff by a creditor, Mitchell. The disposition of the case depended on whether the Oregon state court had validly obtained jurisdiction over Neff in the earlier action. In the process of answering that question, the Court laid down the constitutional parameters of state court jurisdiction. The foundation of its opinion was the notion of territoriality: when acting upon persons or property within its borders the state may, consistent with due process, adjudicate rights and determine obligations. However, the Constitution was thought to create a bright and unmistakable barrier to the exercise of power beyond the state border. Any attempt to exercise such extraterritorial power was thought to be prohibited by the Fourteenth Amendment.

> "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them." 95 U.S. at 727.

Consequently, the Court held that *in personam* jurisdiction over Neff, i.e., jurisdiction over his person, the power to adjudicate the claims against him, up to any sum, and to create an absolute bar to further litigation of liability, could not have been obtained in the initial action, since Neff had not been physically present in Oregon.[14] However, the Court also noted that it *would* have been possible to obtain jurisdiction to litigate the Mitchell-Neff controversy by attaching, prior to the initial action, any property held by

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[14] This concept of physical presence was subsequently expanded to permit personal service outside the state of residence on a temporarily absent domiciliary. *Milliken* v. *Meyer*, 1940, 311 U.S. 457.

the defendant in Oregon.[15] By thus achieving jurisdiction over the defendant's Oregon property, the state court could enter a binding judgment up to the value of that property. This is *in rem* jurisdiction. For cases like that discussed in *Pennoyer,* where the *res* attached has no direct relation to the matter under litigation and is only meant to provide a handle for jurisdiction and a fund for execution, the legal profession has coined one of its least enchanting phrases, such jurisdiction being referred to as *quasi in rem.*[16]

The property under consideration in *Pennoyer* was a piece of land, but a quarter of a century after that decision the Supreme Court addressed itself to the possibility of obtaining *quasi in rem* jurisdiction through the attachment of intangible assets. On the basis of facts bearing considerable resemblance to the case at bar, the Court upheld such a jurisdictional device in *Harris v. Balk,* 1905, 198 U.S. 215. The Court held that a state court judgment rendered against a non-resident defendant, with jurisdiction founded on the garnishment of a debt owed that defendant by an individual temporarily within the state was entitled to full faith and credit in subsequent litigation between the defendant and the garnishee, since the state court had obtained constitutionally recognized jurisdiction. The Court located the debt with the debtor for purposes of asserting territorial authority; and, therefore, personal service on the debtor was sufficient to give the state the power to adjudicate any claim against the creditor up to the amount of the

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[15] The Court denied full faith and credit to the original judgment because the attachment had been made after the judgment against Neff. 95 U.S. at 733-34. Generally, as in the instant case, the process of attachment amounts to no more than the filing with the court, the issuance of writs to the garnishees, and the publication of notice to the defendant.

[16] *See generally Developments in the Law-State Court Jurisdiction,* 73 Harv. L. Rev. 909 (1960).

debt. This was true even though the transaction giving rise to the garnished obligation had no connection with the attaching state. The Court held that:

> "Attachment is the creature of the local law . . . If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that state."

198 U.S. at 222.[17]

Appellee attempts to distinguish *Harris* on the ground that the plaintiff in the challenged original action under scrutiny in that case, the person in the position analogous to that of appellant here, was himself a resident of the state whose law authorized the attachment. It is appellee's contention that this connection of the plaintiff with the forum state was *the* crucial factor tipping the finding in *Harris*. With that proposition we must disagree. While there is language in *Pennoyer* that might have led to a conclusion that the validity if all *in rem* jurisdiction is dependent on the plaintiff's residence in the attaching or garnishing state[18], this broad judicial hint was never de-

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[17] It is clear in the instant case that the courts of Mississippi would be open to suits by Searle seeking recovery of the debts that have been attached. Appellee does not contend otherwise.

[18] "So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them. . . Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold . . . any property owned by such non-residents to satisfy the claims of its citizens."
Pennoyer v. Neff, 95 U.S. 714, 723.

veloped into a controlling principle. A reading of the opinions in both *Pennoyer* and *Harris* leads inexorably to the conclusion that the Court was concerned not with subtle questions of the forum state's "interest" in the litigation, but with matters of territorial power and the situs of an intangible asset. Indeed the question urged upon us as essential to the disposition of this case was never expressly or impliedly relied on by the Court in *Harris*.[19] The Supreme Court explicitly disavowed any such restriction on the *Pennoyer* line of cases in *Ownbey* v. *Morgan*, 1921, 256 U.S. 94, 109, stating:

> "In Pennoyer v. Neff, it was shown that the process of foreign attachment has its fundamental basis in the exclusive jurisdiction and sovereignty of each state over persons and property within its border; and although emphasis was there laid upon the authority and duty of a state to protect its own citizens in their claims against non-resident owners of property situate within the state, it is clear that, by virtue of the "privileges and immunities" clause of Section 2 of Article 4 of the Constitution, each state is at liberty, if not under duty, to accord the same privileges of protection to creditors who are citizens of other states that it accords to its own citizens."

Were this 1905, or even 1945, the appellee's constitutional objections to the Mississippi chancery procedure would have been fully answered at this point. Over the last thirty years, however, a veritable army of courts and commentators have besieged the citadel of territorial jurisdiction. The old territorial standards have been castigated as at

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[19] Indeed, the opinion in *Harris* noted the extent to which the courts of each state are open for the adjudication of the claims of non-residents. 198 U.S. at 223-24. Though not directed explicitly to the matter of *in rem* jurisdiction, the Court's language supports the proposition that *Harris* was concerned with territorial power and not with the nature of the parties.

once too restrictive and too permissive, preventing states from obtaining jurisdiction in cases in which they had substantial "interest," while permitting the exercise of authority by states that were virtual strangers to both the parties and the claim[20]. The inflexible rules of the *Pennoyer* era have been loosened, primarily in order to permit the expansion of the scope of state jurisdiction. In its historic opinion in *International Shoe Co.* v. *Washington*, 1945, 326 U.S. 310, the Supreme Court rejected decades of precedent basing *in personam* jurisdiction over corporations on the fiction of corporate "presence,"[21] and called for a standard that looks less toward territorial power and more toward the convenience of the parties.

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff. . . . But now . . . due process requires only that . . . he have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

326 U.S. at 316.

*International Shoe* laid the foundation for the massive structure of long-arm statutes that have transformed the

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[20] *See, e.g.*, von Mehren & Trautman, *Jurisdiction to Adjudicate*, 79 Harv. L. Rev. 1121 (1966); Comment, *Garnishment of Intangibles*, 67 Col. L. Rev. 550 (1967); *Developments in the Law-State Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).

[21] The problem of identifying corporate presence had concerned the Court in many jurisdictional decisions in the early decades of this century. *See, e.g.*, Davis v. Farmers' Cooperative Equity Co., 1923, 262 U.S. 312; People's Tobacco Co. v. American Tobacco Co., 1918, 246 U.S. 79; Simon v. Southern Ry. Co., 1915, 236 U.S. 115.

jurisdictional landscape.[22] Now appellee urges us to apply this flexible standard developed to increase the scope of jurisdiction *in personam* to the present *in rem* proceeding. Appellee contends that a resort to the doctrine of *International Shoe* will defeat Mississippi's attempt to assert jurisdiction here over a non-resident defendant on behalf of a non-resident plaintiff on a cause of action arising outside the state, since Mississippi lacks the "minimum contacts" with the litigation necessary to justify an assertion of power over the defendant. In short, appellee urges us to assimilate *in rem* and *in personam* actions for the purpose of judging the constitutionality of a state exercise of jurisdiction.

Appellee cannot, of course, be subjected to suit in Mississippi if it would violate justice and fair play, regardless of the name given the particular type of jurisdiction. However, it is one thing to say that the standard of substantial justice propounded in *International Shoe* remains applicable regardless of the legal technicalities involved in a given case; it is quite another matter to contend that those technicalities have no bearing on the underlying constitutional issue. The crucial question before us is the extent to which we are free to say that the application of these hoary rules of *in rem* jurisdiction is violative of substantial justice. For despite earlier hints to the contrary[23], the Supreme Court clearly indicated in its opinion in *Hanson* v. *Denckla*, 1958, 357 U.S. 235, that much still remains of both the old notions of territoriality and the ancient distinction between *in rem* and *in personam* actions when judgments are being made on the constitutional validity of state process.

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[22] *See* McGee v. International Life Ins. Co., 1957, 355 U.S. 220; Dawkins v. White Products Corp., 5 Cir. 1971, 443 F.2d 589.

[23] Mullane v. Central Hanover Bank & Trust Co., 1950, 339 U.S. 306, 312.

> "Founded on physical power . . . the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister states. The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State."

357 U.S. at 246.

While emphasizing that the assignment of a location to intangibles can raise difficult problems,[24] the Court recognized that intangible assets are subject to the *in rem* and *quasi in rem* jurisdictions of the state courts, 357 U.S. at 247.

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[24] Debts represent perhaps the easiest intangible assets to locate so long as the federal rule established in *Harris* remains—that a debt travels with the debtor and can be attached, pursuant to state law, wherever the debtor is subject to *in personam* jurisdiction. Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527 (S.D.N.Y. 1972).

It has been pointed out that the Supreme Court has never expressly extended the rule of *Harris* to include garnishment of corporate debtors. 4 Wright and Miller, *Federal Practice and Procedure* 278, n. 43. There is no basis in the cases, however, for a blanket immunity, protecting all those who are creditors of corporations from *quasi in rem* jurisdiction. The potential for injustice is, of course, obvious. While individual garnishees can usually be personally served only where they are actually found or where they reside, many large corporate garnishees are available for personal service in a score of states or more. This problem can be dealt with in light of present law through the case by case application of the flexible standards of fairness urged by appellee or through a refinement of the notions of the situs of a debt in order to exclude from garnishment sums owed by multi-state corporations on transactions having no connection with the forum. Even under the most restricted notions of situs, however, attachment jurisdiction would be permissible here, since a portion of the monies owed to appellee by residents of Mississippi does relate to transactions conducted in Mississippi.

Although the Supreme Court has not had occasion since *Harris* to reconsider the specific question of *quasi in rem* jurisdiction based on the attachment of a debt, the continued vitality of that decision was examined and accepted by the Second Circuit Court of Appeals, en banc, in *Minichiello* v. *Rosenberg,* 2 Cir., 1968, 410 F.2d 106. *Minichiello* was a constitutional challenge to the state judiciary's interpretation of a New York statute as authorizing *quasi in rem* jurisdiction in automobile accident cases through the "attachment of the defendant's interests in liability insurance policies issued by companies doing business in New York, CPLR §§ 5201, 6202." 410 F.2d at 107. Addressing itself to the very question raised here, the constitutionality under the Due Process Clause of the exercise of such attachment jurisdiction, the Second Circuit dismissed the argument, contending:

> "Appellants complain we did not adequately focus on the burden to a nonresident of having to defend a personal-injury action in another state, conceivably far from his domicile and the place of the accident, simply because his liability insurer has chosen to do business there.
>
> We find this argument unpersuasive so long as Harris v. Balk . . . stands." 410 F.2d at 117-18.[25]

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[25] The Second Circuit in its decision in *Minichiello* placed considerable emphasis on the fact that the plaintiff was a resident of the forum state, the very point urged upon us by appellee as controlling here. However, the plaintiff's resident was treated by the Court in *Minichiello* as significant in relation to the constitutionality of imposing New York law on the contractual obligation of the insurance company-garnishee to defend the suit. In analyzing this application of New York state law to an out of state contract, the Second Circuit turned to Watson v. Employers Liability Assurance Corp., 1934, 348 U.S. 66, in which the Supreme Court had upheld a similar imposition of the law of Louisiana on foreign insurance contracts. In *Watson* the fact of some physical connection with

In light of both *Harris* and *Hanson* this court cannot say that the presence of a potential defendant's debtor within a state is either irrelevant or insignificant in determining the fairness of subjecting the defendant to the process and tribunals of that state. Indeed, the presence of a *res*, tangible or otherwise, within the jurisdiction represents a crucial point of contact. It goes far toward providing the essential "minimum" necessary for the constitutional assumption of jurisdiction.

We are not unmindful of the fact that chancery proceedings like the one considered here appear as harsh reminders of an earlier era. Even granting the availability of the doctrine of forum non conveniens as an assuaging tool in these instances, were we faced today with a case like the *Harris v. Balk* of old, in which a defendant's debtor wanders across a border line and thereby subjects the defendants to the process of a strange and distant state, the tendency to call a halt would be strong. However, we are not here presented with the Case of the Peripatetic Debt. Appellee can hardly claim to be a stranger to Mississippi or its laws. It has regularly dealt with companies incorpo-

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the forum was considered crucial for the application of Louisiana law to overturn contract provisions entered into out of state.

The Supreme Court has made it clear that the questions of state power to exercise jurisdiction over a dispute and state authority to apply its own substantive law to the resolution of that controversy are distinct. While it is true that no forum can apply *any* law until it has valid jurisdiction, a state *with jurisdiction* can be constitutionally precluded by the Due Process and Full Faith and Credit Clauses from applying its own law if it lacks sufficient contact with the parties or the event giving rise to the litigation. *See, e.g.*, Home Ins. Co. v. Delta & Pine Land Co., 1934, 292 U.S. 143.

It was the Second Circuit's emphasis on the choice of law aspect of *Minichiello* that led to rehearing en banc on the broader due process issue and a holding squarely resting on *Harris* v. *Balk*.

rated or licensed to do business in Mississippi. In the course of these transactions Searle both expected and received the protection of Mississippi law. The prospect of having to defend a suit in that state, albeit on a foreign cause of action, cannot fairly be seen as a rude and unbelievable shock to a company that maintains employees and ships several hundred thousand dollars worth of merchandise into Mississippi each year.[26] In the horse and buggy days distance was a meaningful menance. Today we approach the speed of light, and corporations avail themselves of all the modern aspects of living. In our mobile society corporations cannot feel alien where their commercial interests magnetize them.

This court does not sit to comment on the wisest or most intellectually coherent system of state court jurisdiction.

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[26] An examination of the opinion of the district court and the arguments made on this appeal indicate that the real concern of appellee is not with the unfairness of having to appear in the courts of Mississippi, but rather with the application of the law of that state, specifically the rather lengthy Mississippi period of limitations. Appellee seems to assume that a decision on the jurisdictional question is dispositive on the matter of choice of law. While a policy of permitting a state to take jurisdiction only over those controversies to which it can justifiably apply its own substantive law has been much bruited about by the commentators, *compare* Ehrenzweig, *The Transient Rule of Personal Jurisdiction*, 65 Yale L. J. 289, 292 (1956) *with* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1128-33 (1966), the Supreme Court has not accepted such a formulation. See footnote 25.

Since the question of the application of the Mississippi statute of limitations was reserved in the court below and has not been briefed on appeal, we express no opinion on either the appropriate limitations period under Mississippi choice of law rules, *see* Klaxon Co. v. Stentor Manufacturing Co., 1941, 313 U.S. 487, or the constitutionality of the application of Mississippi law to the facts of this case. *See* Home Ins. Co. v. Dick, 1930, 281 U.S. 397.

The contours and implications of corporate peregrinations are not to be drawn by federal courts. Within constitutional limits the states must be permitted to use their own transits in surveying jurisdiction. We sit only to measure state action against the constitutional parameters and to prohibit those assertions of jurisdiction that exceed the farthest reach of constitutional authority. On the facts of this case, we cannot say that Mississippi has gone too far in calling appellee to account in its courts. Intangible property is present in the state, appellee is not a stranger to the jurisdiction forced into litigation through the wanderings of a stray debtor, and the applicable state law clearly provides both actual notice and opportunity to be heard.[27] Under these circumstances the exercise of state court jurisdiction, and hence federal jurisdiction on removal, is not violative of either the principles of fairness[28] or territorially[29] mandated by the Fourteenth Amendment.

## CONCLUSION

Finding that appellant's cause of action has cleared both the state and federal hurdles set up in the district court, we reverse.

REVERSED and REMANDED

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[27] *See* Mullane v. Central Hanover Bank & Trust Co., 1950, 339 U.S. 306.

[28] International Shoe Co. v. Washington, 1945, 326 U.S. 310.

[29] Hanson v. Denckla, 1958, 357 U.S. 235.

**APPENDIX C**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 73-1308

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MRS. NANCY K. STEELE,
*Plaintiff-Appellant,*

*versus*

G. D. SEARLE & CO., ET AL.,
*Defendants-Appellees.*

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*Appeal from the United States District Court for the Southern District of Mississippi*

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 14, 1973, 5 Cir., 1973, .... F.2d ....).

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(October 31, 1973)

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Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing filed on behalf of G. D. Searle & Co. is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.